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Indiana Law Journal

Volume 6 | Issue 6 Article 6

3-1931

Pleading-Appeal and Error-Theory of the Case

PLEADING—APPEAL AND ERROR—THEORY OF THE CASE—The complaint showed that the plaintiff attempted to charge as negligence acts constituting a violation of section 2903 Burns' Ann. St. 1926, and also undertook to allege common law negligence. Defendant's demurrer for insufficient facts was overruled. Verdict and judgment for plaintiff in the trial court and defendant appeals. *Held*, reversed, with instructions to sustain appellant's motion for a new trial on the ground that the verdict is not sustained by sufficien evidence. (For comment on this point see 6 Indiana Law Journal 125.) The overruling of a demurrer for insufficient facts is not reversible error where evidence is introduced covering the deficincy and the case was fairly tried and determined on the merits. *Cleveland, C. C. & St. L. Ry. Co. v. Gillespie*, Appellate Court of Indiana, June 27, 1930, 173 N. E. 708.

This decision, as have others of the more recent decisions, properly gives effect to section 725 Burns' Ann. Ind. St. 1926 which provides, "No judgment shall be stayed or reversed, in whole or in part, by the Supreme Court, for any defect in form, variance or imperfection contained in the record, pleadings, process, entries, returns, or other proceedings therein, which, by law, might be amended by the court below, but such defects shall be deemed to be amended in the Supreme Court; nor shall any judgment be stayed or reversed, in whole or in part, where it shall appear to the court that the merits of the cause have been fairly tried and determined in the court below." Such decisions, however, seem to be irreconcilable with the doctrine of the theory of the case as heretofore applied in Indiana; e. g., *Union City v. Murphy* (1911), 176 Ind. 597, 96 N. E. 584. That doctrine is that the pleader must have and maintain in his pleadings a definite theory of his case, and judgment can be given in his favor only on that theory and no other. *Clark on Code Pleading*, 174; *Mescall v. Tully*, 91 Ind. 96, 99. The question suggests itself as to whether or not it shall be

applied in the trial courts. If it is to be applied in the trial court, as it has been until recently, the parties are compelled to accept the theory attributed by the trial court to the pleading when in all probability the pleader had no theory or he would not have pleaded ambiguously. The only requirement of the Code is that he plead the facts constituting his cause of action or defense. Shall the court then select a theory for the pleader or shall he be allowed to take advantage of any theory he may be able to prove? After the court has determined the theory and the trial is had, the case is submitted to the jury upon the court's theory and no other, and so far as that action is concerned the party has lost the benefit of any other theory under which he may have been successful. This is repugnant to the obvious tenor and purpose of the Code to rid the parties of the dangers of the strict and highly technical rules of pleading and to permit cases to be decided upon the merits in as many instances as possible. If for any reason the court allows the case to go to the jury upon more than one theory, contrary to the doctrine of the theory of the case, a plaintiff is given an advantage to which he should not be entitled as long as the theory of the case is law and as such is relied upon by the defendant. If this be error below, under the statutes and the principal case it is not later available to the defendant. It is there said that the defendant should not be heard to complain so long as the plaintiff has proved a cause of action whatever the theory may be. But if the doctrine is applied in the trial court in favor of the defendant the plaintiff may be prevented from recovering upon a legitimate cause of action and it is obvious that in such a case there is not an adjudication upon the merits within the meaning of section 426 Burns' Ann. St. 1926 which provides, "The court must, in every stage of the action, disregard any error or defect in the pleadings or proceedings which does not affect the substantial rights of the adverse party; and no judgment can be reversed or affected by reason of such error or defect." In other words if the theory of the case is not to be applied in the courts of review because of section 725, it should not be applied by the trial court because of section 426 which to all intents and purposes lays down the same rule for the trial courts as section 725 does for the appellate courts.

Apparently the first case in Indiana on this point was *Neifeder v. Chastain* (1880), 71 Ind. 363, which was an action on a note. Defendant pleaded fraud and in alleging false representations made by the plaintiff stated that the screens, the right to sell which was the consideration of the note, were worthless. It was claimed that this statement made the plea sufficient as alleging a failure of consideration. In answer to this the court said, "The bare general allegation that an article was worthless, thrown into a plea attempting to set up the defense of fraud, cannot make good a plea which without it would be bad. The material substantive facts pleaded are those upon which the validity of the plea must depend; its sufficiency cannot be made to depend upon a sweeping concluding statement that the article was wholly without value. If this were the rule, then every plea attempting the defense of fraud could be made good by adding the general allegation that the article was valueless. This we think utterly inconsistent with the rule of pleading, and we also think that such a practice would lead to confusion and injustice. Especially would it lead to evil results in the trial courts, where time is not always allowed to critically examine

pleadings, and a pleading made good by an isolated general statement might often mislead both court and counsel, who would naturally consider, not detached general conclusions, but the general frame and drift of the entire pleading." This line of reasoning seems to be the basis of the doctrine of the theory of the case. However its cogency is doubtful and is repudiated in effect in the principal case. True, the purpose of the pleadings is that the parties shall have notice before the trial of the adversary's positions so that necessary evidence may be gathered, but this can be brought about by a motion to make more specific or to strike out surplusage or by a motion to separately state and number the causes of action if more than one right is asserted. (For further discussion and citations see note in 50 L. R. A. (N. S.) 3.)

The question seeems to center upon the consideration of which is the more important, the necessity for knowledge of the exact position to be taken by the adversary upon the trial and the combative evidence consequently necessary, or the principle that cases should be decided upon their merits and that the real parties should not be made to suffer by reason of the mistakes or inadvertence of their counsel in pleading their cause. Undoubtedly both are very desirable and the ideal forms and rules of pleading must find the happy medium which will embody both of these principles to the greatest possible degree. It may be that after all there are inherent difficulties in giving notice by formal written pleadings and that some better method can be found. See *Clark on Code Pleading*, pp. 28 to 38.

Whether or not the doctrine of the theory of the case is actually law in Indiana today is now doubtful.The statutes and the recent decisions seem to indicate that it is not. In the principal case the court says, "We will concede without deciding, that the complaint was not technically good, and proceed to a consideration of the evidence, for, 'even though it was not technically good,' if evidence was admitted without objection covering the deficiency existing in the complaint, and the case was fairly tried and determined on the merits the overruling of the demurrer, if erroneous, would not constitute reversible error," citing *Pittsburg C. C. & St. L. Ry. Co. v. Rushton* (1925), 148 N. E. 337. In the Rushton case the court said substantially the same thing and added thereto, "Nor was there any error in overruling appellant's motion asking that appellee be required to elect upon what theory the case would be tried." And in another part of the same opinion, "But when a cause has been appealed to this court after trial and where the evidence is in the record, we are required to do more than decide that the action of the court in overruling a demurrer was error. We must then determine whether, in view of the whole record, the ruling, if erroneous, was prejudicial to the adverse party. In deciding this question we may look to the evidence and to other parts of the record, and, if it appears from the whole record that the erroneous ruling did not prejudice the adverse party, and that the case was fairly tried and determined on its merits, it is our duty to affirm, regardless of such error." It is apparent from these and similar decisions that the failure of the trial court to apply the doctrine of the theory of the case is not reversible error. But the fact remains that according to the earlier cases it is error not to apply it.

As indicated above it is submitted that the theory of the case is no longer law in the trial courts in Indiana. Other states, for the most part, have repudiated the doctrine and the courts of this state have many times enunciated the rule that after judgment the pleadings are deemed to be amended to conform to the proof and that the plaintiff should be allowed to recover if he has proved a cause of action. It is suggested that these principles are more important in securing justice than the danger of surprise, the prejudicial effect of which has to a great extent been removed by the provisions of section 423 Burns' Ann. St. 1926, and that therefore the doctrine of the theory of the case should be specifically repudiated in this state as it has been in others. S. J. S.